RECORD AND BRIEFS

Nos. 16-285, 16-300 & 16-307

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IN THE
Supreme Court of the United States

EPIC SYSTEMS CORPORATION,
Petitioner,
v.
JACOB LEWIS,
Respondent.

ERNST & YOUNG LLP, ET AL.,
Petitioners,
v.
STEPHEN MORRIS, ET AL.,
Respondents.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
MURPHY OIL USA, INC., ET AL.,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Fifth, Seventh, and Ninth Circuits

BRIEF OF LABOR LAW PROFESSORS AS *AMICI CURIAE* SUPPORTING RESPONDENTS IN Nos. 16-285 & 16-300 AND PETITIONER IN No. 16-307

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INTEREST OF *AMICI CURIAE*[1]

Amici are law professors long engaged in the study and teaching of labor law. All of them have published articles about the relationship between federal labor law – in particular, the Norris-LaGuardia Act of 1932 ("Norris-LaGuardia") and the National Labor Relations Act of 1935 ("NLRA") – and the Federal Arbitration Act of 1925 ("FAA").[2]

Amici's interest here derives from their responsibilities as law professors. *Amici* teach students to understand the law as a system faithful to professional standards of analytical care, and they emphasize that statutes must be read with close attention to their texts, histories, and policies to achieve their legislated ends. *Amici* believe that fidelity to those standards compels the conclusion that Norris-LaGuardia precludes

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), counsel for *amici* also represent that all parties have consented to the filing of this brief by submitting letters granting blanket consent to the filing of *amicus* briefs.

[2] *See* Matthew W. Finkin, *The Meaning and Contemporary Vitality of the Norris-LaGuardia Act*, 93 Neb. L. Rev. 6 (2014); Catherine L. Fisk, *Collective Actions and Joinder of Parties in Arbitration: Implications of DR Horton and Concepcion*, 35 Berkeley J. Emp. & Lab. L. 175 (2014); Julius Getman & Dan Getman, *Winning the FLSA Battle: How Corporations Use Arbitration Clauses to Avoid Judges, Juries, Plaintiffs, and Laws*, 86 St. John's L. Rev. 447 (2012); Ann C. Hodges, *Can Compulsory Arbitration Be Reconciled with Section 7 Rights?*, 38 Wake Forest L. Rev. 173 (2003); Katherine V.W. Stone, *Procedure, Substance, and Power: Collective Litigation and Arbitration Under the Labor Law*, 61 UCLA L. Rev. Disc. 164 (2013); Charles A. Sullivan & Timothy P. Glynn, *Horton Hatches the Egg: Concerted Action Includes Concerted Dispute Resolution*, 64 Ala. L. Rev. 1013 (2013).

judicial enforcement of the provisions in the employment arbitration agreements of petitioners Epic Systems Corporation, Ernst & Young LLP and Ernst & Young U.S. LLP, and respondent Murphy Oil USA, Inc. (collectively, "Employers") that prohibit their employees from pursuing adjudication or arbitration of workplace claims on a joint, class, collective, or representative action basis.[3]

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[3] *Amici* also agree with petitioner National Labor Relations Board ("NLRB") and respondents Sheila Hobson, Jacob Lewis, Stephen Morris, and Kelly McDaniel (collectively, "Employees") that these prohibitions on concerted action are unlawful and unenforceable under the NLRA. Because the NLRB's and Employees' briefs fully address the NLRA, *amici* focus exclusively on Norris-LaGuardia.

SUMMARY OF ARGUMENT

The Norris-LaGuardia Act of 1932, 29 U.S.C. § 101 *et seq.* ("Norris-LaGuardia" or "the Act"), bars enforcement of contracts that forbid employees from engaging in concerted activities for their mutual aid or protection, including concerted pursuit of legal claims. Section 2 of the Act declares as "the public policy of the United States" that "the individual unorganized worker . . . shall be free from the interference, restraint, or coercion of employers . . . in other concerted activities for the purpose of . . . mutual aid or protection." *Id.* § 102. Section 3 makes such contracts, commonly known as "yellow-dog contracts," unenforceable in federal court. *Id.* § 103.

The plain language of Norris-LaGuardia renders unenforceable the specific type of contract at issue in these cases – employment agreements prospectively waiving the right to act in concert with fellow employees to pursue legal claims to vindicate workplace rights. *See Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-66 (1978). The contract clauses at issue purport to waive employees' rights to engage in certain concerted activity such as bringing "any group, class or collective action claim in arbitration or any other forum," Epic/Murphy Oil JA11, "any class, collective, or representative proceeding," Epic Pet. App. 31a, or "[a]ll claims, controversies or other disputes between [Employers] and an [e]mployee that could otherwise be resolved by a court," Ernst & Young Pet. Br. 7 (first and third alteration in original). Under these provisions, employment disputes can be brought only through bilateral arbitration between the employee and employer; these contracts purport to forbid concerted pursuit of legal claims by employees.

Beyond the plain text, *amici*'s historical research confirms that the contracts at issue here fall into the broad category of contractual restrictions on concerted employee activities that Congress targeted in the Act. A wide variety of yellow-dog contracts were enforced before Norris-LaGuardia, and Congress intended to bar all of them from enforcement, not just contracts restricting unionization.

The Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* ("FAA"), does not save these contracts from Norris-LaGuardia's enforcement bar. Sections 2 and 3 of Norris-LaGuardia render unenforceable contracts that restrain employees' engagement in concerted activities for their mutual aid or protection by limiting them to individual claims to vindicate workplace rights. The FAA, as Employers interpret it, mandates the enforcement of the very same yellow-dog contracts because the restriction on concerted activities is paired with an arbitration requirement. If Employers' interpretation of the FAA were correct, there would be an irreconcilable conflict between the two statutes, and the later-enacted Norris-LaGuardia Act would prevail.

Further, Norris-LaGuardia's express terms dictate what must be done should any other federal law appear to mandate actions contrary to the policy it announces. It provides that "[a]ll acts and parts of acts in conflict with the provisions of this chapter are repealed." 29 U.S.C. § 115.

In fact, there is no conflict. The FAA's saving clause, 9 U.S.C. § 2, exempts from the FAA contracts unenforceable under general contract defenses, such as illegality or voidness for conflict with public policy. *See, e.g., Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967) (FAA "make[s] arbitration agreements as enforceable as other

contracts, but not more so"). The concerted-action waivers in question are unenforceable under generally applicable contract defenses because they violate "the public policy of the United States," 29 U.S.C. § 102, and are made unenforceable by statute, *id.* § 103. Employers do not contest these points. In fact, they ignore Norris-LaGuardia almost entirely. But the Act is dispositive; it squarely addresses the type of concerted-action waivers at issue in these cases and makes them unenforceable.

ARGUMENT

I. NORRIS-LAGUARDIA BARS ENFORCEMENT OF CONTRACTS THAT PREVENT EMPLOYEES FROM BRINGING JOINT OR COLLECTIVE LEGAL CLAIMS TO ENFORCE WORKPLACE RIGHTS

Though ignored almost completely by Employers and their *amici*, Norris-LaGuardia is fatal to their arguments. Norris-LaGuardia speaks to the heart of these cases – contracts imposed by employers prospectively waiving the concerted-action rights recognized by federal statutes. Norris-LaGuardia declares such contracts to violate the public policy of the United States and makes them unenforceable in federal court.[4]

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[4] Although the courts of appeals did not engage with Norris-LaGuardia in the decisions below, the NLRB recognized that it "aimed to prevent employers from imposing contracts on individual employees requiring that they agree to forego engaging in concerted activity." *In re D.R. Horton, Inc.*, 357 NLRB 2277, 2281 (2012), *enf. granted in part, rev'd in part, D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013). Indeed, Norris-LaGuardia provided the textual grounding for the later-enacted NLRA, which "built upon and expanded the policies reflected in the Norris-LaGuardia Act." *Id.* at 2282.

A. The Plain Language Of Sections 2 And 3 Of Norris-LaGuardia Prohibits Enforcement Of Contractual Restrictions On Concerted Legal Claims By Employees

Read together, sections 2 and 3 of Norris-LaGuardia preclude judicial enforcement of the concerted-action waivers at issue in these cases. Section 2 establishes a public policy against any interference with workers' "other concerted activities for the purpose of . . . other mutual aid or protection," which plainly covers joint, class, collective, or representative action to vindicate workers' rights. Section 3 plainly states that contracts violating that policy are unenforceable.

Section 2 declares as "the public policy of the United States" that:

> Whereas under prevailing economic conditions, . . . ***the individual unorganized worker*** is commonly helpless to exercise actual liberty of contract . . . , wherefore, . . . ***it is necessary*** . . . ***that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents***, in the designation of such representatives or in self-organization or ***in other concerted activities for the purpose of*** collective bargaining or ***other mutual aid or protection***; therefore, the following definitions of, and limitations upon, the jurisdiction and authority of the courts of the United States are enacted.

29 U.S.C. § 102 (emphases added). Any contract with "employers of labor, or their agents," that constitutes "interference, restraint, or coercion" of an "individual unorganized worker" affecting his or her participation "in other concerted activities for the purpose of . . . mutual aid or protection" violates this federal policy. *Id.*

The category of "*other* concerted activities" by its terms encompasses something broader than joining or organizing a union. *Id.* (emphasis added). Indeed, if it was not broader than "self-organization," *id.*, the phrase would be superfluous. *See Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 837 (1988).

Section 3 establishes that "any other undertaking or promise in conflict with the public policy declared in section [2] . . . shall not be enforceable in any court of the United States." 29 U.S.C. § 103. That is, contracts restricting employees' rights to engage in concerted activities for mutual aid or protection are unenforceable.[5] This is one of two categories of employer-employee agreements made unenforceable by section 3, the other being any one in which a worker "undertakes or promises not to join, become, or remain a member of any labor organization." *Id.* The distinction between the two categories of unenforceable agreements makes clear that the category of "any other undertaking or promise in conflict with the public policy declared in section [2]" encompasses a broader range of agreements than contracts restricting unionization. *Id.*

By its terms, "other concerted activities for the purpose of . . . mutual aid or protection," *id.* § 102, includes employees acting in concert to bring claims for resolution by a judge or arbitrator to protect their

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[5] So intent was Congress on preventing employers from forcing employees to forgo their right to engage in concerted activities for their mutual aid or protection that Norris-LaGuardia addressed not just contracts but also any "undertaking or promise," thus ensuring that any such promise would not be enforceable in federal court, regardless of whether it constituted a valid contract under state law.

shared workplace rights (or an employee bringing such a claim on behalf of other employees). Norris-LaGuardia does not define "other concerted activities" or "mutual aid or protection," so ordinary meaning controls, *see Lawson v. FMR LLC*, 134 S. Ct. 1158, 1165 (2014), "[a]bsent a clearly expressed legislative intention to the contrary," *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

"Concerted activities" plainly includes employees bringing a grievance, complaint, or action together. Under any reasonable interpretation, such a joint legal claim is an "activity" that is "concerted," and Employers offer no plausible contrary reading of those words. And when employees act in concert to bring legal claims to vindicate workplace rights – such as their right under the Fair Labor Standards Act of 1938 to overtime pay or wages for time spent on work activities – they clearly do so for the purpose of "mutual aid or protection." 29 U.S.C. § 102. The employees involved seek reciprocal benefit. The participation of each one benefits the others (*i.e.*, provides "aid") by spreading the costs of litigation or arbitration, and potentially achieving an outcome that benefits many employees (*e.g.*, obtaining damages for multiple claimants and thus deterring the employer from committing similar violations). Through joint or collective claims, employees also provide each other with "mutual . . . protection" because strength in numbers shields them from retaliation, and such claims can protect all employees from further violations.[6]

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[6] *See Mutual*, BLACK'S LAW DICTIONARY 800 (2d ed. 1910) ("[i]nterchangeable; reciprocal; each acting in return or correspondence to the other; given and received"); *Mutual*, BLACK'S LAW DICTIONARY 1218 (3d ed. 1933) (same); *Mutual Aid*,

The plain meaning of this language is confirmed by precedent. This Court has held that "concerted activities for the purpose of . . . mutual aid or protection" encompasses efforts "to improve working conditions through resort to administrative and judicial forums." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-66 (1978). Every court of appeals to consider the question has agreed.[7] These cases interpret section 7 of the NLRA, which contains language derived from Norris-LaGuardia.[8]

WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1618 (2d ed. 1934) ("[r]eciprocal aid among men in social groups").

[7] *See NLRB v. Alternative Entm't, Inc.*, 858 F.3d 393, 402-03 (6th Cir. 2017) ("[c]oncerted activity" includes pursuit of employment claims "in *all* forums, arbitral and judicial"); Ernst & Young Pet. App. 10a ("'mutual aid or protection clause'" of the NLRA "includes the substantive right to collectively 'seek to improve working conditions through resort to administrative and judicial forums'"); Epic Pet. App. 5a ("Collective or class legal proceedings fit well within the ordinary understanding of 'concerted activities.'"); *Brady v. NFL*, 644 F.3d 661, 673 (8th Cir. 2011) ("[A] lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of employment *is* 'concerted activity' under § 7 of the National Labor Relations Act."); *Mohave Elec. Coop., Inc. v. NLRB*, 206 F.3d 1183, 1188-89 (D.C. Cir. 2000) ("mutual aid or protection" clause protects collective action in litigation); *Altex Ready Mixed Concrete Corp. v. NLRB*, 542 F.2d 295, 297 (5th Cir. 1976) ("[g]enerally, filing by employees of a labor related civil action is protected activity under section 7 of the NLRA"); *Leviton Mfg. Co. v. NLRB*, 486 F.2d 686, 689 (1st Cir. 1973) ("the filing of a labor related civil action by a group of employees is ordinarily a concerted activity protected by § 7").

[8] Section 7 of the NLRA declares that "[e]mployees shall have the right . . . to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. As the Senate Report to an early draft of the NLRA made plain: "The first unfair labor practice restates

Section 4 of Norris-LaGuardia provides further textual support for the conclusion that Congress intended the Act to protect the concerted prosecution of legal claims. Section 4 deprives federal courts of jurisdiction to enjoin participation, "whether singly or in concert," in a set of enumerated actions to advance workplace rights. 29 U.S.C. § 104. Subsection (d) bars injunctions against "all lawful means aiding any person participating or interested in any labor dispute who is . . . prosecuting[] *any action or suit in any court* of the United States or of any State." *Id.* § 104(d) (emphasis added). Congress thus recognized bringing a lawsuit as a protected right of workers, on par with striking, *id.* § 104(a), "[b]ecoming or remaining a member of any labor organization," *id.* § 104(b), and picketing, *id.* § 104(f).

Epic and Murphy Oil incorrectly maintain that section 4 supports them. They argue (at 38-39) that "[a]ll of the activities specified in section 4 were things employees could do on their own" rather than "obligating a tribunal or employer to treat them as a class." But their characterization that Employees contend that a tribunal is "obligat[ed] . . . to treat [employees] as a class" is a strawman. The protected right is to *pursue* concerted legal claims, which is something employees can "do on their own." Neither the NLRA nor Norris-LaGuardia guarantees that such claims can proceed as a class action. Class treatment can be denied under Rule 23 or any generally applicable

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the familiar law already enacted by Congress in section 2 of the Norris-La Guardia Act[,] . . . rights which are admitted everywhere to be the basis of industrial no less than political democracy." S. Rep. No. 73-1184, at 4 (1934).

procedural rules, just not based on illegal contracts that forbid concerted activities.[9]

Epic and Murphy Oil further argue (at 39) that "none of the specified activities [in section 4] had anything to do with class proceedings," so "there is no reason to think Congress intended 'concerted activities' to include class proceedings." Employers misrepresent their own agreements and ignore the statute's plain text. The clauses that Employers seek to enforce restrict not just "class" proceedings but any litigation or arbitration filed or joined by more than one employee. Such joint claims are clearly encompassed within section 4, which addresses participation in litigation, "whether singly or in concert." 29 U.S.C. § 104. Moreover, Employers provide no justification for their assumption that the "concerted activities" protected from employer action in NLRA §§ 7 and 8 and yellow-dog contracts in Norris-LaGuardia §§ 2 and 3 are limited to the set of practices protected from injunctions in Norris-LaGuardia § 4. Employers' nontextual reading of section 4 provides no justification for this Court to revisit its holding in *Eastex* that the "concerted activities for . . . mutual aid or protection" language in NLRA § 7 (which derives from Norris-LaGuardia § 2) includes joint pursuit of legal claims.

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[9] *See, e.g., D.R. Horton*, 357 NLRB at 2286 n.24 ("Nothing in our holding guarantees class certification; it guarantees only employees' opportunity to pursue without employer coercion, restraint or interference such claims of a class or collective nature as may be available to them under Federal, State or local law. Employees who seek class certification in Federal court will still be required to prove that the requirements for certification under Rule 23 are met, and their employer remains free to assert any and all arguments against certification (other than the [unlawful waiver]).").

B. The History Of Norris-LaGuardia Shows That Congress Intended To Render Unenforceable Contracts Restricting Any Concerted Activities To Advance Employee Interests, Including Joint Legal Claims

The historical context and legislative history of Norris-LaGuardia reinforce the conclusion compelled by the statutory text.

Congress enacted Norris-LaGuardia to remedy the decades-old management practice of requiring workers to submit to contract terms prohibiting them from engaging in concerted activities for their mutual aid or protection (including, but not limited to, joining unions). *See* Finkin, 93 Neb. L. Rev. at 9-17; *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348, 397-400 (2014) (Werdegar, J., concurring and dissenting) (describing Norris-LaGuardia's history), *cert. denied*, 135 S. Ct. 1155 (2015).

Congress's initial efforts to regulate employers' imposition of such terms on workers were struck down in a series of *Lochner*-era cases as an impermissible infringement on employers' "freedom of contract." *See, e.g., Adair v. United States*, 208 U.S. 161, 172-76 (1908); *see also Coppage v. Kansas*, 236 U.S. 1, 9-14 (1915) (striking down similar state legislation). In *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229 (1917), the Supreme Court gave its express imprimatur to the enforceability of such yellow-dog contracts, upholding an injunction against collective organizing efforts on the ground that such contracts gave employers an enforceable property right.

Congress enacted Norris-LaGuardia in 1932 to address the same problem in a different way: by eliminating the authority of the federal courts to enforce such agreements. *See* 29 U.S.C. § 103; *see generally*

IRVING BERNSTEIN, THE LEAN YEARS: A HISTORY OF THE AMERICAN WORKER, 1920-1933, Ch. 11 (1969). As the Senate Report states, "[o]ne of the objects of this legislation is to outlaw this 'yellow dog' contract." S. Rep. No. 72-163, at 15 (1932); *see also* H.R. Rep. No. 72-669, at 6 (1932) ("Section 3 is designed to outlaw the so-called yellow-dog contract."); *see generally* JOEL I. SEIDMAN, THE YELLOW DOG CONTRACT (1932) (contemporaneous doctoral dissertation on history and content of yellow-dog contracts).

The phrase "yellow-dog contract" encompasses more than agreements that forbid employees from joining unions; it applies to all contracts that restricted employees from concerted pursuit of workplace rights. The term was first applied to leases of company housing in mining towns that prohibited anyone other than the miners' immediate family members, doctors, and morticians from having access to miners' homes, on pain of eviction. *See* Seidman at 31. Mining companies feared that allowing miners to talk to union organizers – or even to fellow workers in the privacy of the home – might lead to group action.[10]

Because *Hitchman Coal* opened the door to judicial enforcement of all manner of yellow-dog contracts, "[a]n almost endless array of legal games were played by employers that made almost all collective action by workers susceptible to legal prohibitions." DANIEL JACOBY, LABORING FOR FREEDOM: A NEW LOOK AT THE HISTORY OF LABOR IN AMERICA 62 (1998). These included employer-mandated promises "to adjust any

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[10] The United States Coal Commission of 1922 condemned the "yellow dog" leases used by mining companies in its report, "Civil Liberties in the Coal Fields." U.S. COAL COMM'N, S. Doc. No. 68-195, REPORT OF THE UNITED STATES COAL COMM'N, pt. 1, at 169-70 (1925).

dispute that might arise by individual bargaining," as, for example, by waitresses at the Exchange Bakery & Restaurant in New York City; to renounce any "concerted action [with co-workers] with a view to securing greater compensation" at the Moline Plow Company; or to "arbitrate all differences" according to the machinery set up by the employer and its company union at United Railways & Electronic Company. Seidman at 58-60, 66, 69. A contract offered by the Clinton Saddlery Company provided: "No employee can unite with his fellow workers in any effort to regulate wages, hours, etc." *Id.* at 65.

Congress was well aware of the breadth of these contractual limitations on group efforts, and it enacted Norris-LaGuardia to outlaw the full gamut of such "yellow dog" contracts. As the Senate Report made clear, "[n]ot all of these contracts are the same, but . . . [i]n all of them the employee waives his right of free association . . . in connection with his wages, the hours of labor, and other conditions of employment." S. Rep. No. 72-163, at 14. In fact, just two years before adoption of Norris-LaGuardia, Senator William E. Borah answered the question "[W]hat is [a] 'yellow dog' contract?" on the Senate floor by citing one that provided: "I agree during employment under this contract that I . . . will not . . . unite with employees in concerted action to change hours, wages, or working conditions." 72 Cong. Rec. 7931 (Apr. 29, 1930).[11]

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[11] Senator Borah and several colleagues, including Senators Norris and Wagner, spoke at length about yellow-dog contracts in the successful opposition to the nomination of Judge John J. Parker in 1930 to be a Supreme Court Justice. The opposition centered on Judge Parker's affirmance of an injunction against striking miners who had signed a yellow-dog contract. *See International Org., United Mine Workers v. Red Jacket Consol.*

Congress thus intended all promises or undertakings that restricted employees to a course of individual dealing with their employer to be extirpated as fully as possible under federal law.

C. Enforcement Of Waivers Of Concerted Legal Claims Offends The Policy Of Norris-LaGuardia

Norris-LaGuardia's statement of "the public policy of the United States" rests on Congress's finding that "the individual unorganized worker is commonly helpless to exercise actual liberty of contract." 29 U.S.C. § 102. For that reason, the Act declares as "the public policy of the United States" that "it is necessary" that an employee "have full freedom of association . . . and that he shall be free from the interference, restraint, or coercion of employers . . . in other concerted activities for the purpose of . . . mutual aid or protection." *Id.* That express statement of public policy was a direct response to widespread efforts by employers at the time to require worker grievances to be presented exclusively on an individual basis. The policy is as relevant now as it was in 1932. Where wage and hour violations are widespread but individual instances

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Coal & Coke Co., 18 F.2d 839, 849 (4th Cir. 1927). Several of the speeches informed Senators of the variety of yellow-dog contracts. *See, e.g.*, 72 Cong. Rec. 6574-79 (Apr. 7, 1930); *id.* at 7932 (Apr. 29, 1930) (remarks of Sen. Borah) (citing Exchange Bakery contract described in text *supra* pp. 13-14). In fact, Senator Norris spoke specifically about the use of yellow-dog contracts to preclude concerted legal action: "It would enjoin anyone from coming to our aid, from furnishing an appeal bond." 72 Cong. Rec. 8191 (May 2, 1930). The legislative record in 1930, fast upon Congress's initial failure to enact Norris-LaGuardia in 1928 and just prior to its subsequent enactment in 1932, further evidences Congress's contemporaneous understanding of what its law was designed to prohibit.

involve small amounts, or where fear of employer retaliation or lack of access to qualified counsel is pervasive, aggregation of claims may be the only means of protecting workers.

In this way, Congress opposed what it saw as the *Lochner*-era judiciary's single-minded promotion of "liberty of contract." S. Rep. No. 72-163, at 15; *see Lochner v. New York*, 198 U.S. 45, 57 (1905); *see generally* Daniel Ernst, *The Yellow-Dog Contract and Liberal Reform, 1917-1932*, 30 Lab. Hist. 251, 251-52 (1989).[12] The Supreme Court has long understood Norris-LaGuardia to repudiate that embrace, which it characterized in hindsight as the courts' "'self-mesmerized views of economic and social theory.'" *Burlington N.R.R. Co. v. Brotherhood of Maint. of Way Emps.*, 481 U.S. 429, 453 (1987) (quoting *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 382 (1969)).

It was and remains the public policy of the United States that employees should be free to join together in making common cause in any matter of work-place rights, without interference by their employer. Norris-LaGuardia conceives of that right as substantive, a civil liberty insulated from any promise or

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[12] As stated in the debate on Norris-LaGuardia:

> This [freedom-of-contract] doctrine presupposes that the girl who seeks a position in a department store, and the owner of that store deal with each other on terms of equality. She is free to work or not to work; he is free to employ or not to employ her.
>
> Or, to take another illustration, that a worker seeking employment with the United States Steel Corporation and the manager, acting for the corporation, deal on terms of equality. One who still believes that will believe anything.

75 Cong. Rec. 5515 (Mar. 8, 1932) (remarks of Rep. Schneider).

undertaking that would blunt its exercise. As Senator Norris stated, "Human liberty is at stake." 72 Cong. Rec. 8190 (May 2, 1930). Congress viewed the right of employees to act in concert as no less a substantive right than the First Amendment right "peaceably to assemble."

The statutory language and history establish that Norris-LaGuardia's policy guaranteeing the right to concerted activity is not limited to joining a union or engaging in collective bargaining, but extends to collective efforts to enforce workplace rights. As this Court has recognized, rights to earned wages "bear[] such a relation to employees' interests as to come within the guarantee of the 'mutual aid or protection' clause." *Eastex*, 437 U.S. at 569.

Any promise or undertaking by which an employee abjures his future right to engage in concerted legal action directly conflicts with the express federal policy declared in Norris-LaGuardia and is unenforceable by "any court of the United States." 29 U.S.C. § 103.[13]

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[13] In an effort to escape the application of Norris-LaGuardia, Employers may point to *Textile Workers Union v. Lincoln Mills of Alabama*, 353 U.S. 448, 457-59 (1957) (citing Norris-LaGuardia § 7). That case was unrelated to the non-enforceability of concerted-action waivers under sections 2 and 3 of the Act. *Lincoln Mills* concerned whether the "stiff procedural requirements for issuing an injunction in a labor dispute" under section 7 were intended to prevent a court from enforcing an employer's promise to arbitrate disputes with a union. *Id.* at 458. Sections 2 and 3 were not mentioned in *Lincoln Mills*, which is unsurprising, because that case involved the prospect of arbitration by a labor union as the collective representative of employees, not what is at issue here – the putative waiver of the right to collective action in the first instance. Section 2 denounces "yellow dog" contracts because they disadvantage the "individual unorganized worker[s]"

D. The Retail Litigation Center Misconstrues The Norris-LaGuardia Act And Ignores Its Purpose

Norris-LaGuardia plays a critical role in these cases because it circumscribes the jurisdiction of the federal

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who sign them, 29 U.S.C. § 102, a concern entirely absent when the contracting party is a labor union.

Similarly, *Boys Markets, Inc. v. Retail Clerk's Union, Local 770*, 398 U.S. 235 (1970), is not in tension with the position advanced here. That case involved the anti-injunction provisions of Norris-LaGuardia and the provision of the later-enacted Labor Management Relations Act, 1947 ("LMRA") that permitted suits in federal court to enforce contracts between employers and labor organizations. The question in *Boys Markets* was whether Norris-LaGuardia's anti-injunction provision prohibited federal courts from ordering a union not to strike, if the union had entered into a collective-bargaining agreement with a no-strike provision and an arbitration provision that encompassed the underlying grievance. In holding that Norris-LaGuardia did not prohibit judicial enforcement of the no-strike clause in those circumstances, the Supreme Court stated that the literal terms of Norris-LaGuardia's anti-injunction provision "must be accommodated to the subsequently enacted provisions of [the LMRA]" because "[s]tatutory interpretation requires . . . consideration [of] the total corpus of pertinent law and the policies that inspired ostensibly inconsistent provisions." *Id.* at 250.

Here, there is nothing in the FAA that Norris-LaGuardia must "accommodate[]" because the FAA's saving clause excludes contracts subject to the general contract defenses of illegality and conflict with public policy. *See infra* Part II.A. Moreover, while *Boys Market* favored the LMRA as a statute enacted later than Norris-LaGuardia, as between the FAA and Norris-LaGuardia, Norris-LaGuardia would take precedence in any conflict as the later-enacted statute. Indeed, Norris-LaGuardia expressly provides for the *pro tanto* repeal of any previously enacted statute with which it comes into conflict. 29 U.S.C. § 115. Finally, *Boys Markets* concerned Norris-LaGuardia's anti-injunction provisions; because no contract with an employee restricting concerted activities was at issue, sections 2 and 3 were irrelevant, and *Boys Markets* did not purport to interpret those provisions.

courts over the relief Employers seek – enforcement of their agreements. Nevertheless, Employers have chosen to ignore it. *See supra* p. 11. Only one *amicus* in support of Employers seeks to fill this gap, and it ignores both the plain text of the statute and its purpose. *See* Retail Litigation Center Br. 28-30. Retail Litigation Center argues that the purpose of sections 2 and 3 was to prevent "'agreements stating that the workers were not and would not become labor union members'" and that "[t]he comparison to an arbitration agreement is absurd" because "[a]n arbitration agreement does not inhibit unionization." *Id.* at 29 (quoting *Lincoln Fed. Labor Union No. 19129 v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 534 (1949)). But Norris-LaGuardia § 3 does not bar enforcement only of contracts "not to join, become, or remain a member of" a union; it also bars contracts "in conflict with the public policy declared in section [2]," which protects the right to engage in all "concerted activities" for employees' "mutual aid or protection." 29 U.S.C. §§ 102, 103. Retail Litigation Center simply ignores language that contradicts its reading, and it attempts to read it out of the statute. Moreover, as shown above, *supra* Part I.B, Norris-LaGuardia's purpose was to ban a wide variety of contracts restricting concerted activities and was not limited to unionization.[14]

Retail Litigation Center also attempts to excise out of Norris-LaGuardia most of section 4, claiming (at 29) that the section only prevents courts from "enjoining strikes" and "protect[s] picketers, not class plaintiffs."

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[14] *Northwestern Iron* does not mention Norris-LaGuardia. It merely states that contracts banning employees from joining unions were one type of "yellow dog contract[]" covered by state and federal labor laws. 335 U.S. at 534.

It ignores that section 4 bars injunctions of nine separate activities, including participation in litigation. *See* 29 U.S.C. § 104(d); *supra* p. 10. Although Retail Litigation Center (at 30) condemns the NLRB's reliance on Norris-LaGuardia as "revisionist history," it in fact offers the ahistorical reading of Norris-LaGuardia, ignoring the pertinent provisions of the statute.

II. THE FAA DOES NOT MANDATE ENFORCEMENT OF CONTRACTS THAT ARE UNENFORCEABLE UNDER NORRIS-LAGUARDIA

A. The FAA's Saving Clause Exempts Contracts That Violate Norris-LaGuardia From The FAA

Properly understood, there is no conflict between the FAA and Norris-LaGuardia. The FAA does not require enforcement of contractual terms that are unlawful and contrary to public policy. The two statutes can be harmonized through the FAA's saving clause.

Under the FAA's saving clause, an agreement to arbitrate is enforceable, "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Illegality and inconsistency with statutorily prescribed public policy are and were widely recognized general contract defenses, both at the time of the FAA's enactment and today. *See* Restatement (First) of Contracts § 512 (1932) ("A bargain is illegal within the meaning of the Restatement of this Subject if either its formation or its performance is criminal, tortious, or otherwise opposed to public policy."); *see also* Restatement (Second) of Contracts § 178(1) (1981) ("A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed

in the circumstances by a public policy against the enforcement of such terms."). Norris-LaGuardia both provides that contracts restricting concerted activities by employees are unenforceable and declares such contracts to be against "the public policy of the United States." 29 U.S.C. §§ 102, 103. These contracts are thus unenforceable under the general contract defenses of illegality and public policy. *See* Epic Pet. App. 14a-15a.

The doctrine that contracts may be unenforceable if contrary to public policy or statute is "generally applicable," not one that is specifically "applied in a fashion that disfavors arbitration." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341 (2011). An arbitration agreement contrary to federal policy and unenforceable under federal statute is just as unenforceable as any other illegal contract that is contrary to public policy. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967) ("As the 'saving clause' in § 2 indicates, the purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, but not more so.").

Concepcion is not to the contrary. In that case, this Court held that a state common-law doctrine forbidding class-arbitration waivers "interfere[d] with fundamental attributes of arbitration and thus create[d] a scheme inconsistent with the FAA." 563 U.S. at 344. But the FAA's saving clause confirms what a straightforward application of the generally applicable illegality defense already requires: the FAA does not require enforcement of contract terms that purport to eliminate the federal substantive right to "concerted activities for the purpose of . . . mutual aid or protection." 29 U.S.C. § 102.

Unlike the *Discover Bank* doctrine invalidated in *Concepcion*,[15] Norris-LaGuardia is supportive of, rather than hostile to, arbitration. Section 8 of Norris-LaGuardia facilitates "voluntary arbitration" of labor disputes. 29 U.S.C. § 108. Decades of experience of labor arbitration have shown that arbitration of collective employment claims is practical and efficient, and involves none of the "procedural morass" with which this Court was concerned in *Concepcion*. 563 U.S. at 348-50. *See generally* National Academy of Arbitrators Br.

Applying Norris-LaGuardia's ban on enforcement of yellow-dog contracts thus contravenes neither the text nor the pro-arbitration policy of the FAA.

B. Insofar As The FAA Is Read To Require Enforcement Of Employment Contracts Mandating Bilateral Arbitration, It Would Be Superseded By Norris-LaGuardia

The clauses at issue are unenforceable under Norris-LaGuardia regardless of this Court's interpretation of the FAA's saving clause. Employers interpret the FAA to require enforcement of employment contracts mandating that all employment disputes be submitted to bilateral arbitration, with no joint or collective pursuit of legal claims in either a judicial or an arbitral forum permitted. *See, e.g.*, Epic/Murphy Oil Br. 18-29. If this interpretation of the FAA were correct (and, as shown above, *see supra* Part II.A, it is not), enforcement would nonetheless be barred by Norris-LaGuardia.

Under Employers' interpretation of the FAA, the FAA and Norris-LaGuardia are irreconcilable. Both

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[15] *See Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005).

the FAA and Norris-LaGuardia relate to the enforceability of contracts. The FAA makes one set of contracts (arbitration clauses in maritime or commercial contracts) "enforceable," 9 U.S.C. § 2, and Norris-LaGuardia states that another set of contracts (contracts restricting employee unionization or concerted activities for mutual aid or protection) "shall not be enforceable," 29 U.S.C. § 103. Although the sets of contracts covered by the two statutes are generally distinct, they intersect in the form of employment contracts requiring bilateral arbitration of all employment disputes. Such contracts are unenforceable under Norris-LaGuardia, *see supra* Part I, but (under Employers' view) enforceable under the FAA.

Any conflict between the two statutes must be resolved in favor of Norris-LaGuardia as the later-enacted statute. Most obviously, fidelity to the text of Norris-LaGuardia so requires because the statute expressly dictates what courts should do in the event of a conflict with another statute. It provides that "[a]ll acts and parts of acts in conflict with the provisions of this chapter [29 U.S.C. §§ 101-115] are repealed." 29 U.S.C. § 115.

And even absent this provision, settled principles of statutory interpretation require that, when two statutes "are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one." *Posadas v. National City Bank of New York*, 296 U.S. 497, 503 (1936). The FAA was enacted in 1925 and Norris-LaGuardia in 1932. Thus, to the extent the FAA conflicts with Norris-LaGuardia, Norris-LaGuardia controls.

The FAA was codified as part of the re-codification of the United States Code in 1947, but re-codification by itself is not a substantive amendment. *See, e.g.*,

Finley v. United States, 490 U.S. 545, 554 (1989); *United States v. Welden*, 377 U.S. 95, 98 n.4 (1964); *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 227 (1957); *Anderson v. Pacific Coast S.S. Co.*, 225 U.S. 187, 198-99 (1912). For purposes of applying the later-enacted statute canon, *see Posadas*, 296 U.S. at 503, the Supreme Court has held that a non-substantive re-enactment is not considered a later enactment, *see Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961). As the NLRB pointed out, "[i]t seems inconceivable that legislation effectively restricting the scope of the Norris-LaGuardia Act and the NLRA could be enacted without debate or even notice, especially in 1947, when those labor laws were both relatively new and undeniably prominent." NLRB Pet. App. 52a. Thus, Norris-LaGuardia would take precedence over the FAA in the event of any conflict.

C. The FAA Does Not Take Precedence Over Norris-LaGuardia

Employers and their *amici* argue that, in the event of a conflict, the FAA should take precedence over the labor statutes. These arguments fail.

1. Epic and Murphy Oil argue (at 54) that the FAA should take precedence over the NLRA as the purportedly "more specific" statute (they do not address Norris-LaGuardia). Their argument rests on a selective quotation of this Court's decision in *Morton v. Mancari*, 417 U.S. 535 (1974), which stated: "*Where there is no clear intention otherwise*, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Id.* at 550-51 (emphasis added). In Norris-LaGuardia, Congress expressed its clear intention that "[a]ll acts and parts of acts in conflict with [Norris-LaGuardia] are

repealed." 29 U.S.C. § 115. Thus, even if the FAA were deemed more specific, Norris-LaGuardia expressly repealed all earlier conflicting statutes.

In any event, Norris-LaGuardia is the more specific statute addressed to the question in these cases. Each statute declares that certain types of contractual clauses within its sphere (provisions restricting concerted activities for Norris-LaGuardia; arbitration clauses for the FAA) are either unenforceable (Norris-LaGuardia) or enforceable (FAA). But Norris-LaGuardia addresses a much narrower sphere: it applies specifically to employment contracts, 29 U.S.C. §§ 102, 103, whereas the FAA applies generally to all contracts "involving commerce" (and maritime contracts), 9 U.S.C. § 2.

2. Another group of law professors, who do not profess any expertise in labor law, appear as *amici* to argue that the FAA enjoys a special stature among federal statutes such that, "[i]f Congress does not expressly override the FAA, . . . then the federal statute cannot be construed to abrogate or amend the parties' arbitration agreement." Law Professors in Support of Employers Br. 10; *see also id.* at 9 (statute can limit FAA only if it "expressly precludes or limits arbitration"). Their assertion conflicts with this Court's clear holding that, "[l]ike any statutory directive, the [FAA's] mandate may be overridden by a contrary congressional command," which can be shown by "the statute's text or legislative history or from an inherent conflict between arbitration and the statute's underlying purposes." *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226-27 (1987) (citation

and alteration omitted).[16] This Court has never so privileged the FAA as to impose a requirement that a statute must refer expressly to arbitration to override it. Such a requirement would violate the canon that "[t]he legislature cannot derogate from . . . the authority of its successors." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 278 (2012). This canon makes it "[im]permissible for a legislature to prescribe the only words that will be effective to produce an amendment." *Id.* at 279.[17]

Norris-LaGuardia contains a "congressional command" that employers may not "interfere[]" with or "restrain[]" concerted legal action by contract. 29 U.S.C. § 102; *see supra* Part I.A; *see also supra* Part I.B. The lack of an express reference to arbitration in Norris-LaGuardia does not obscure this clear intent.[18]

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[16] In fact, the "contrary congressional command" test does not apply here because these agreements purport to waive employees' substantive statutory rights to engage in concerted activities, and such waivers are unenforceable, even under the FAA. *See* Hobson Br. 49-50. But even if a "contrary congressional command" were required, it is present here.

[17] At most, the Court has suggested that, where two constructions of a statute are "in equipoise," a construction that does not restrict arbitration will be favored. *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 109 (2012) (Sotomayor, J., concurring in the judgment).

[18] There is no question, for example, that, under Title VII of the Civil Rights Act of 1964, employers may not enforce a racially discriminatory arbitration agreement on their employees, notwithstanding the lack of any reference to arbitration in that statute. Similarly, other civil rights statutes such as the Age Discrimination in Employment Act of 1967 or the Americans with Disabilities Act of 1990 would preclude enforcement of arbitration clauses that discriminated against the protected group, regardless of the lack of mention of arbitration. The result

After all, "the arbitration requirement" in these clauses "is not the problem"; the problem is the "ban on initiating, in any forum, concerted legal claims." Ernst & Young Pet. App. 12a. When Congress enacted Norris-LaGuardia, there was no reason to expect that employers would integrate arbitration clauses into yellow-dog contracts by pairing a restriction on concerted legal claims with an arbitration requirement.

Further, Congress had no reason to consider the FAA's application to workers over whom Congress (under then-prevailing precedent) had no power. When both the FAA and Norris-LaGuardia were enacted, "congressional authority to regulate under the commerce power was to a large extent confined by [Supreme Court] decisions" to the actual channels and instrumentalities of interstate commerce. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 116 (2001). Congress had power to regulate the terms and conditions of employment for only those workers whose work took them across state lines, and these workers it exempted. *Id.* It would be extraordinary to hold that, because Congress failed to anticipate both this Court's expansion of the commerce power and its application of the FAA three-quarters of a century

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should be no different here, not least because Norris-LaGuardia, like the antidiscrimination statutes, was conceived as a civil rights law. *See* 75 Cong. Rec. 4504 (Feb. 23, 1932) (remarks of Sen. Norris) ("He can not associate with his fellows. In connection with his fellows, he can not present a grievance to the employer. . . . He must singly present any grievance he has. . . . He has no opportunity to join with his fellows and make his demands effective. In effect, if he must live and support his family and clothe his children, he must surrender his liberty."). To give effect to its plain text and protect the substantive right of freedom of association, the Act need not expressly state that it cannot be short-circuited by an arbitration clause.

later, the law enacted in 1932 must be denied its plain meaning, its policy given no effect.

* * *

In the debate on Norris-LaGuardia, Representative Schneider expressed the hope that, even though the nation's emerging industrial and social problems would call for future legislative redress, "[a]t least, the problem of . . . 'yellow-dog' contracts will have been removed from the arena and we can then take up other questions." 75 Cong. Rec. 5515 (Mar. 8, 1932). Alas, the yellow-dog contract has re-entered the arena, and courts have not thus far fully engaged the law Congress fashioned precisely to eradicate this social evil. This Court should apply Norris-LaGuardia's protections according to their plain text, as Congress always intended.

CONCLUSION

The judgments of the Seventh Circuit in No. 16-285 and of the Ninth Circuit in No. 16-300 should be affirmed; the judgment of the Fifth Circuit in No. 16-307 should be reversed.

Respectfully submitted,

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